76- 1321

Supreme Court, U. S.
FILED
OCT 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. _____

* * *

**W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,**
Petitioner

V.

EARL MABRY, JR.,
Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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IN THE

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W.J. ESTELLE, JR. DIRECTOR,
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* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner, W.J. Estelle, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 7, 1976.

OPINION BELOW

The unpublished opinion of the Court of Appeals, *Mabry v. Estelle*, No. 75-2947 (5th Cir. May 7, 1976), appears in the Appendix at 1 [hereinafter cited as (A. _____)]. The Memorandum and Order entered by the District Court for the Northern District of Texas, Amarillo Division, denying and dismissing Respondent's application for writ of habeas corpus

appears in the Appendix at 8.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 7, 1976. A timely petition for rehearing and rehearing en banc was denied on July 19, 1976. (A. 17). A stay of the issuance of the mandate of the Court of Appeals through August 25, 1976, pending petition for writ of certiorari, was granted on August 9, 1976. (A. 19). An extension until October 15, 1976 was granted and this petition for certiorari was filed within the time allowed by the extension of the stay order.

QUESTIONS PRESENTED

1. Whether federal court redetermination of state court factual findings made in the course of a full and fair hearing is a proper allocation of fact-finding responsibility between state and federal courts in federal habeas corpus proceedings for state prisoners under 28 U.S.C. §2254 (d).

2. Whether the harmless error standard applicable to a constitutional error occurring in the conviction phase of a bifurcated trial is also applicable to a constitutional error occurring in the sentencing phase.

STATUTE INVOLVED

28 U.S.C. §2254:

> "(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or

> an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;

BEST COPY AVAILABLE

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

STATEMENT OF THE CASE

Respondent is a state prisoner pursuant to judgment and sentence of the 181st District Court of Potter County, Texas, in Cause No. 15,067-B. He was convicted on August 30, 1971, by a jury upon an indictment charging him with the felony offense of murder with malice and was assessed punishment by the jury at nine hundred ninety-nine years imprisonment in the Texas Department of Corrections. The Court of Criminal Appeals of Texas affirmed the conviction and judgment on April 18, 1973. *Mabry v. State*, 492 S.W.2d 951 (Tex. Crim. App. 1973).

Respondent initially filed an application for writ of habeas corpus in the convicting state court on July 7, 1973. The trial judge did not conduct an evidentiary hearing but filed findings of fact and conclusions of law on February 25, 1974. The Court of Criminal Appeals of Texas denied the application without written order.

Respondent subsequently filed his application for writ of habeas corpus pursuant to 28 U.S.C. §2241,*et seq.*, in the United States District Court for the Northern District of Texas. He contended, *inter alia*, that prior misdemeanor convictions in Florida used by the State of Texas for enhancement purposes were void because he had not been represented by counsel and had not waived counsel when he entered pleas of guilty to those misdemeanor charges. Subsequent pleadings demonstrated that the challenged misdemeanor convictions were not used for enhancement purposes. Rather, the convictions were introduced during the sentencing phase of the bifurcated trial, following a hearing outside the presence of the jury, to show the prior criminal record of the defendant and his general reputation and character pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.07 (1965).

The federal district court found that Respondent was not represented by counsel at the time of the Florida convictions, that he was indigent at that time (contrary to the findings of fact of the trial and appellate courts), and that he had not knowingly and voluntarily waived counsel. The district court found, however, that the introduction of evidence of the prior Florida convictions constituted harmless error as defined in *Chapman v California*, 386 U.S. 18 (1967) and *Harrington v. California*, 395 U.S. 250 (1969), and denied Respondent's petition. *Mabry v. Estelle*, No. CA-2-74-86 (N.D. Tex., May 29, 1975); (A. 8).

Respondent appealed to the United States Court of Appeals for the Fifth Cricuit which subsequently reversed the district court and remanded for entry of an order directing that Respondent be released or retried within a reasonable time. *Mabry v. Estelle*, No. 75-2947 (5th Cir., May 7, 1976); (A. 1).

Petitioner's timely application for rehearing and rehearing en banc was denied on July 19, 1976. (A. 17). A stay through August 25, 1976, pending petition for writ of certiorari was granted on August 9, 1976, (A. 19) and an extension of the stay until October 15, 1976 was granted.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Misconstrues The Allocation Of Fact-Finding Responsibility Between State And Federal Courts In Federal Habeas Corpus Proceedings For State Prisoners.

The broad scope of federal habeas corpus as a remedy for state prisoners established by lower federal courts following *Fay v Noia*, 372 U.S. 391 (1963) and *Townsend v. Sain*, 372 U.S. 293 (1963) has aggravated the tension in federal-state relations.[1] While the writ serves many indispensible functions in assuring the vindication of federal rights, this Court has recently attempted to accomodate the writ's use to the needs of the federal system without diluting its role in protecting fundamental rights.[2] With respect to making these

[1]Wright and Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L. J. 895 (1966).

[2]*Stone v. Powell*, ____ U.S. ____, 96 S.Ct. 3037 (1976); *La Valle v. Rose*, 410 U.S. 690 (1973).

accomodations in disputes concerning the facts underlying federal claims, federal courts should redetermine the facts only when the state has failed to find the facts after a "full and fair" hearing as defined in *Townsend v. Sain, supra*.[3]

Respondent's factual contentions were resolved against him after a full and fair hearing by the state trial court and review by the highest state appellate court. At the sentencing phase of the state trial, the court — after hearing testimony outside the presence of the jury, (A. 27-30) — found[4] that Respondent was not

[3]Although 28 U.S.C. §2254(d) spells out eight grounds for rebutting the presumed validity of state court fact findings, the heart of the review power is that the state prisoner was not afforded a full and fair hearing on the disputed facts.

[4]The finding against indigency by the state trial court was implicit in its decision to admit evidence of the two prior misdemeanor convictions. Findings need not be explicit to satisfy the requirements of 28 U.S.C. 2254(d). As the court in *La Valle v. Rose, supra*, stated:

> "Although the state trial judge did not specifically articulate the basis in federal law for his decision, it can scarcely be doubted from the court's decision that Respondent' factual contentions were resolved against him." *Id.* at 314.

The *La Valle* court also quoted the following from *Townsend v. Sain, supra*:

> "[T]he coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the [federal] district judge may, in the ordinary case *in which there has been no articulation*, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence... that there is reason to suspect that an incorrect standard was applied."

Id. at 314-315. (Emphasis added).

indigent at the time of his prior convictions for serveral misdemeanors including two for carrying and discharging a firearm within the city limits. The judge then barred the introduction of evidence concerning any prior convictions except those involving the illegal possession of a firearm, as the other prior convictions were immaterial to the assessment of Respondent's sentence. (A. 31-33). On appeal, the Court of Criminal Appeals concluded that "in the absence of a showing of indigency, the trial court was not in error in permitting the proof of the two prior misdemeanor convictions in Florida". *Mabry v. State*, 492 S.W.2d 951, 954 (Tex. Crim. App. 1973); (A. 21,25).

Notwithstanding this full and fair hearing of Respondent's factual contentions, the federal district court ordered an evidentiary hearing. The only evidence offered by Respondent to meet his burden of rebutting the presumed validity of the state trial court fact-findings was his testimony — which was contradictory to his state trial court testimony on indigency. *Compare* (A. 27-30) *with* (A. 34). The federal district court, in contradiction to the state trial court, declared that Respondent was indigent at the time of his prior attorneyless convictions. The court concluded, however, that the error in admitting the uncounseled Florida misdemeanor convictions as evidence during the punishment phase of the trial was harmless beyond a reasonable doubt. The court based this holding on two facts:

> 1. "The jury had rejected [Respondent's] claim of self-defense and determined that [Respondent] was guilty of murder with malice.
>
> 2. "The facts reflected by the record show a senseless killing which could easily have supported a determination that the death penalty was proper." *Mabry v. Estelle*, No. CA-2-74-86 at 4 (N.D. Tex., May 29, 1975); (A. 15).

Although the district court judgment favored the Petitioner, that court should never have reached the harmless error issue. The state trial court's findings, presumptively valid after a full and fair hearing, were not rebutted by Respondent's testimony. The federal court's contradictory finding on the indigency question seriously upsets the balance between the fact-finding responsibilities of state and federal courts in federal habeas corpus proceedings for state prisoners. As this Court noted in *Stone v. Powell, supra*:

> "Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." *Id.* at 3050, n.31.

In cases such as Respondent's, a convicted defendant is asking society to redetermine an issue that has no bearing on the basic justice of his incarceration. What can be gained by retrying Respondent, whose criminal behavior was so outrageous that the federal district judge felt confident that a sentence of death could have been supported? Judicial resources would be squandered; state court factual determinations would not be final until the federal habeas corpus remedy was exhausted; friction would be increased between federal

and state systems of justice; and the constitutional balance upon which the doctrine of federalism is founded would be upset.

To be sure, the right to counsel is one of our most cherished constitutional rights. Guaranteeing this right is considered critical to insuring the reliability of the fact-finding process. But how can a mechanical insistence on reversal improve the reliability of the fact-finding process when Respondent, *while represented by counsel below*, admitted the very facts in question in the counselless prior convictions?[5]

A more restricted review of state court factual findings in federal habeas corpus is certain to provoke argument. As this Court noted in the context of federal habeas corpus review of state court applications of the Fourth Amendment:

> "The argument is that state courts cannot be trusted to effectuate Fourth Amendment values through fair application of the rule, and the oversight jurisdiction of this Court on certiorari is an inadequate safeguard. . . .[*W*]*e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.* State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-344 (1816). Moreover, the argument that federal judges are more expert

[5]During the evidentiary hearing in federal district court, Respondent, in describing his prior conviction, stated:

> "I didn't run away from the police; *after I fired the pistol*, I just ran by where I was staying at and threw it to my girlfriend and I just kept on running out in the bushes. . . ."

Record at 12, lines 7-10, *Mabry v. Estelle*, No. CA-2-74-86 (N.D. Tex., May 29, 1975). (Emphasis added).

> in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems." *Stone v. Powell, supra* at 3051, n.35. (Emphasis added).

State courts are just as competent, responsible, and experienced in hearing Sixth Amendment claims. As with search-and-seizure claims, trial judges must resolve questions of the admissibility of evidence of prior offenses on a daily basis. Consequently, any argument that federal judges are "more expert" in applying constitutional standards in this area is just as unpersuasive.

The decision of the court below seriously misallocates the fact-finding responsibility between state and federal courts in federal habeas corpus proceedings. This court should grant this petition in an exercise of its supervisory power over lower federal courts as well as to answer a major recurring question in the federal habeas corpus review of state court factual determinations.

II. The Decision Below Fails To Provide A Standard For Determining When A Constitutional Error Committed At The Sentencing Phase Of A Bifurcated Trial Is Harmless.

The now famous case of *Chapman v. California*, 386 U.S. 18 (1967) established the federal standard for determining whether a constitutional error can be found harmless. "[T]he court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. For errors committed during the *conviction* phase of the trial, the Fifth Circuit has interpreted the *Chapman* standard as "not requiring the setting aside of the state conviction if the evidence of guilt is so overwhelming as to make the error harmless beyond a

reasonable doubt." *Loftis v. Beto*, 450 F.2d 599, 601 (5th Cir. 1971). How the "harmless beyond a reasonable doubt" standard is to be applied to errors committed during the sentencing phase of a bifurcated trial is unclear. Overwhelming evidence of guilt was properly admitted at Respondent's trial. But overwhelming evidence of *guilt* should have little direct effect on the evidence of appropriate *punishment*. Thus the "overwhelming evidence of guilt" interpretation of the harmless error standard seems inapplicable to errors made in the punishment phase of a bifurcated trial.

The interpretation apparently adopted by the Fifth Circuit in *Thomas v. Savage*, 513 F.2d 536 (5th Cir. 1975) is that "an error committed at the sentencing phase of a bifurcated trial is harmless if it has no effect upon the sentence received. . . ." *Id.* at 539. In Respondent's evidentiary hearing in federal district court, the state introduced affidavits from the 12 jurors who convicted and sentenced Respondent saying that the evidence of prior convictions had no effect on their sentence. The federal district judge, after an examination of the Respondent's trial record, stated that "[t]he facts reflected by the record show a senseless killing which could easily have supported a determination by the jury that the death penalty was proper." *Mabry v. Estelle*, No. CA-2-74-86 at 4 (N.D. Tex., May 29, 1975); (A. 15). Yet the court below found that the admission of evidence of the prior counselless misdemeanors was not harmless beyond a reasonable doubt. Assuming *arguendo* that this interpretation is correct, what else must the state show to carry its burden that the admissions of the counselless prior convictions had no effect on the jury

sentence?[6]

Regardless of whether any error that may have been committed was harmless, this court should grant this petition to answer an important federal-law question of first impression which needs to be decided — namely, what standard should be applied in determining whether a constitutional error committed at the *sentencing* phase of a bifurcated trial is harmless?

CONCLUSION

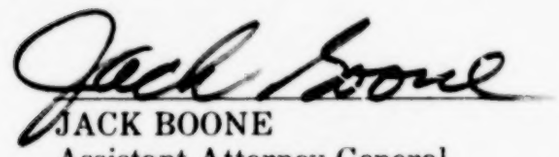
For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division



JACK BOONE
Assistant Attorney General

OF COUNSEL:

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[6]Two other facts provide further evidence of the harmlessness of any error that may have occurred. Respondent's accomplice, certainly less culpable, was sentenced to 99 years for murder with malice. *Randolph v. State*, 493 S.W.2d 869 (Tex. Crim. App. 1973). For the purpose of parole eligibility, both persons will be treated as if they had received 60 year sentences. Thus, Respondent's accomplice received effectively the same sentence without the introduction of evidence of any prior offenses.

THOMAS A. CURTIS
District Attorney
Potter County Courthouse
Amarillo, Texas 79101

Attorneys for Petitioner

P.O. Box 12548, Capitol Station
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CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Petitioner. I do therefore certify that three copies of the foregoing Petition have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the 30th day of September, 1976, addressed to: Mr. Frederick J. Griffin, 418 South Polk Street, Amarillo, Texas 79109.

JOE B. DIBRELL, JR.
Assistant Attorney General
Chief, Enforcement Division

76-4934

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

A P P E N D I X

* * *

Supreme Court of the United States

October Term, 1976

* * *

NO. _____

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

V.

EARL MABRY, JR.,

Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 75-2947

EARL MABRY, JR.,

Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

(May 7, 1976)

BEFORE: WISDOM, GODBOLD and LIVELY*, Circuit Judges.

PER CURIAM. This is an appeal from denial of a petition for habeas corpus. After a jury had found Mabry

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*Of the Sixth Circuit, sitting by designation.

guilty of murder with malice, under Texas criminal practice the same jury heard additional evidence before fixing his punishment at 999 years imprisonment. During the punishment stage of the bifurcated trial the State introduced evidence that Mabry had previously been convicted in Florida of two misdemeanor offenses involving firearms. The district court found that Mabry was not represented by counsel at the time of the Florida convictions, that he was indigent at that time and that he had not knowingly and voluntarily waived counsel. The district court found, however, that the introduction of evidence of the prior Florida convictions constituted harmless error as defined in Chapman v. California, 386 U.S. 18 (1967), and Harrington v. California, 395 U.S. 250 (1969).

In the district court the respondent produced affidavits of the twelve

jurors who rendered the verdict and set the punishment in Mabry's murder trial. These affidavits do not conclusively show that the jury was not influenced by the evidence of prior convictions in fixing Mabry's punishment. The prosecution asked for the death penalty for Mabry and it is now argued that the fact that the jury gave him "only" 999 years indicates that the evidence of prior convictions did not influence the jury.

The burden of showing that error in admission of evidence of prior convictions of an uncounseled defendant is harmless beyond a reasonable doubt is on the State. Thomas v. Savage, 513 F.2d 536, 539 (5th Cir. 1975). The jury did not learn of Mabry's Florida conviction by mere introduction of court records. Instead a police officer from Florida testified as to Mabry's two convictions. In his closing argument the Texas prose-

cutor referred to the Florida convictions as follows:

> Remember, he has been carrying that pistol since 1965; been getting arrested and doing time for it. How many more times does he have to go on?

It appears that Mabry had no prior convictions other than the two about which the jury heard testimony. Except for the evidence of these invalid convictions Mabry would have appeared before the jury as one without previous convictions. We cannot say under these circumstances that the error of the Texas trial court in permitting the jury to hear evidence of the Florida convictions when the only function of the jury was to fix punishment was harmless beyond a reasonable doubt. This court's recent decision in Zilka v. Estelle, ____ F.2d ____, No. 75-1959 (March 25, 1976), does not require a contrary holding. Zilka is distinguishable on a number of counts. It did not

involve a bifurcated trial and the court found that overwhelming evidence of guilt rendered evidence of counselless prior convictions harmless. In the present case the Tainted evidence was introduced after the issue of guilt had been determined. Furthermore, in Zilka the evidence of prior convictions consisted of four questions and answers and "[t]he evidence was not commented upon thereafter by either the lawyers or the judge." (Slip Opinion at 2516).

The judgment of the district court is reversed, and the cause is remanded to the district court for entry of an order directing that Mabry be released unless he is retried within a reasonable time.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-2947

D. C. Docket No. CA-2-74-86

EARL MABRY, JR.,

Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before WISDOM, GODBOLD and LIVELY*, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

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* Of the Sixth Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

May 7, 1976

Issued as Mandate:

U.S. District Court
Northern District of Texas
FILED
May 29, 1975
JOSEPH McELROY, JR.,CLERK
By Edna Wagner /s/
Deputy

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

EARL MABRY, JR., Petitioner	I	
V.	I	CIVIL ACTION NO. 2-74-86
W. J. ESTELLE, JR., Director, Texas Dept. of Corrections, Respondent	I	

MEMORANDUM AND ORDER

Petitioner, EARL MABRY, JR., is a state prisoner, pursuant to judgment and sentence of the 181st District Court of Potter County, Texas, in Cause No. 15,067-B. He was convicted on August 30, 1971, by jury under an indictment charging him with the felony offense of murder with malice and the jury assessed punish-

ment at nine hundred ninety-nine years imprisonment in Texas Department of Corrections. The Court of Criminal Appeals of Texas affirmed the conviction on April 18, 1973. Mabry v. State, 492 SW2d 951 (Tex. Crim. 1973).

Petitioner filed application for writ of habeas corpus pursuant to Title 28, United States Code, Section 2241, et seq, and is proceeding in forma pauperis. He contends that (1) there was no probable cause for his warrantless arrest and subsequent search; (2) the pre-lineup procedures utilized by the arresting authorities in New Mexico were so prejudicial that the in-court identification was fatally tainted; and (3) prior misdemeanor convictions in Florida used by the State of Texas for enhancement purposes were void, because petitioner had not been represented by counsel and had not waived counsel when he entered pleas

of guilty to those misdemeanor charges. Subsequent pleadings reflect that the challenged misdemeanor convictions were not used for enhancement purposes, but had been introduced during the punishment phase of the bifurcated trial to show prior criminal record of the defendant and his general reputation and his character as provided by Article 37.07, Texas Rules of Criminal Procedure.

Petitioner had initially filed application for writ of habeas corpus in the convicting state court on July 7,1973. The trial judge did not conduct an evidentiary hearing but filed findings of fact and conclusions of law on February 25, 1974. The Court of Criminal Appeals of Texas denied the application without written order. Petitioner has exhausted state remedies.

The transcription of the trial proceedings and of a pre-trial hearing have

been filed in this case. The comprehensive opinion of the Court of Criminal Appeals of Texas is also before this Court. The record supports the findings of the trial court and supports the facts contained in the comprehensive opinion of the appellate court that probable cause existed for the arrest of petitioner and the subsequent search, and also that the in-court identification of petitioner was not tainted by the pre-trial identification procedures used by officers in Tucumcari, New Mexico. In any event, petitioner testified at the trial concerning the circumstances surrounding the homicide, including the arrest and search, and admitted his identity and that he shot the decedent. This Court adopts the findings of the trial court concerning the arrest, search, and pre-trial identification procedures and concludes that the first two challenges are without merit.

The third challenge, based on the use of uncounseled misdemeanor convictions at the punishment phase of the trial, is not so easily resolved. The trial court and the Court of Criminal Appeals of Texas had found that the misdemeanor convictions were not of sufficient gravity to have influenced the jury which had heard the testimony and assessed the punishment. The Court also found that petitioner did not prove that he was indigent at the time he entered the misdemeanor pleas. Petitioner had the burden of establishing that fact. Thomas v. Savage, 5th Cir. 1975, ____ F.2d ____ (No. 74-3987, May 23, 1975). He did establish his indigency by his testimony at the later federal evidentiary hearing.

In general, a constitutionally invalid misdemeanor conviction may not be used as evidence at the penalty phase of the trial. Olvera v. Beto, 5th Cir. 1970,

429 F.2d 131; Ex Parte Olvera, 489 SW2d 586 (Tex. Crim. 1973). The record is clear that petitioner was not represented by counsel at the time of the challenged Florida misdemeanor conviction. The burden then rests on the State of Texas to prove that petitioner knowingly and voluntarily waived counsel or that the error in admitting the evidence was harmless. Before a federal constitutional error can be held harmless, however, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. California, 386 US 18 (1967). These issues could not be resolved by the state court record and this Court appointed counsel to represent petitioner and conducted an evidentiary hearing on January 27, 1975.

At the evidentiary hearing, petitioner testified that he was indigent at the time he entered the challenged mis-

demeanor pleas, that he was not advised of his right to appointed counsel, and that he did not waive counsel. Respondent introduced the affidavits of the Court Clerk and of the judge in Florida, reflecting that it was the judge's customary practice to advise an accused of his right to counsel. Nothing was contained in the affidavits indicating that the accused was advised as to his right to appointed counsel and waiver of counsel is not shown by such affidavits. Based upon the testimony of the petitioner at the evidentiary hearing and the affidavits introduced by the respondent, this Court finds that petitioner was not represented by counsel at the time of the challenged Florida misdemeanor convictions, that he did not knowingly and voluntarily waive counsel and that he was indigent.

Respondent further introduced affidavits from each of the twelve jurors who

had convicted petitioner in the murder case and who had assessed punishment. This Court afforded petitioner opportunity to propound written interrogatories to the affiants or to file answering affidavits, pursuant to Title 28, United States Code, Section 2246. The thrust of the jurors' affidavits is that no consideration was given to the evidence concerning prior misdemeanor convictions in assessing the punishment. The determination of guilt had already been made prior to the time the jury heard testimony concerning the prior Florida misdemeanor convictions. The jury had rejected petitioner's claim of self-defense and determined that petitioner was guilty of murder with malice. The facts reflected by the record show a senseless killing which could easily have supported a determination by the jury that the death penalty was proper. This Court concludes that the error in admit-

ting the uncounseled Florida misdemeanor convictions as evidence during the punishment phase of the trial was harmless beyond a reasonable doubt.

It is, therefore, ORDERED that the application for writ of habeas corpus filed by EARL MABRY, JR. be, and it is hereby, DENIED and DISMISSED.

This is a final judgment.

The Clerk is directed to file this Order and to send a true copy to petitioner and a true copy to each attorney of record.

ENTERED at Amarillo, Texas, on this the 28th day of May, 1975.

/s/ Halbert O. Woodward
United States District Judge

Certified a true copy of an instrument on file in my office on May 29, 1975 JOSEPH McELROY, JR., Clerk, U.S. District Court, Northern District of Texas
By /s/ Edna Wagner Deputy

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

TEL 504-589-6514
600 Camp Street
New Orleans, LA. 70130

July 19, 1976

TO ALL COUNSEL OF RECORD

No. 75-2947 - Earl Mabry, Jr. v.
W. J. Estelle, Jr.,
Director, Texas Dept.
of Corrections.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. Frederick J. Griffin
Mr. Jack Boone

U.S. COURT OF APPEALS
FILED
Aug. 9 '76
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2947.

EARL MABRY, JR.,

Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee

- - - - -

Appeal from the United States District Court for the Northern District of Texas

- - - - -

O R D E R:

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(x) The motion of appellee for stay of the issuance of the mandate pending

petition for writ of certiorari is GRANTED to and including August 25, 1976, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

/s/ Pierce Lively
UNITED STATES CIRCUIT JUDGE

Earl MABRY, Jr., Appellant,

V.

The STATE of Texas, Appellee.

No. 46107.

Court of Criminal Appeals of Texas.

April 18, 1973.

OPINION

MORRISON, Judge.

The offense is murder; the punishment, 999 years.

Appellant was convicted of murdering a filling station operator while in the course of a robbery.

Appellant testified that he and his companion while en route from Florida to California found themselves in Amarillo in destitute circumstances. Appellant told how they had gone to what was determined to be the Wild Horse filling station intending to ask for alms in the form of money and gasoline, but decided against this station because there were too many people about. After parking their car around the corner they then went to the Gulf station about one block away where appellant reports he approached the attendant and said, "Look here, sir . . . I'm out of gas . . . I need some money to get something to eat . . . I want to know if you would give me some gas or give me some money or tell me where I could get some or something." Appellant said the attendant replied, "You all are the same

niggers that come in here and try to rob me before" and reached for his pocket where he saw the imprint of a pistol at which time he grappled with the attendant and was himself shot. Appellant recounts that he then called to his companion, "Sylvester, give me that pistol, man, I'm shot" and when Sylvester handed him the pistol which he had brought from Florida "I taken the pistol and started pulling the trigger" and then fled.

Officers in Amarillo ascertained from witnesses at the scene of the filling station robbery-murder that they were looking for a green 1965 Chevrolet with Florida license plates, occupied by two black males, one of whom was injured. The news broadcast of such information was heard by one Mitchell who was traveling from Detroit to California by automobile. Soon thereafter, Mitchell picked up appellant who was hitchhiking on Route 66 near the New Mexico line. Appellant told Mitchell he had run out of gasoline. Mitchell had seen a green Chevrolet nearby matching the description of the one described on the radio earlier. Mitchell took appellant to the next filling station, noting that appellant had blood on, and a bulge in, his shirt. Upon delivering appellant, Mitchell went in search of the police and found Officer Olsen of the New Mexico State Police and informed him of appellant's whereabouts. Olsen also had heard the police broadcast about the robbery-murder in Amarillo and the description of the two passengers in the 1965 green Chevrolet. He and his fellow officer Simpson saw such an automobile driven by the man described by witness Mitchell in the City of Glenrio on the State line, followed the same into New Mexico

where they arrested appellant, who was by then traveling alone, and recovered the pistol from the front seat of the automobile and certain bullets from appellant's person.

Appellant's first ground of error relates to the admissibility of the pistol and the bullets. Appellant contends the police radio bradcast about two black suspects in a green 1965 Chevrolet with Florida plates was too general to give arresting officers probable cause to stop him. We disagree and conclude that probable cause was shown for the arrest and search of the person of appellant. See Weeks v. State, Tex.Cr.App., 417 S.W.2d 716, certiorari denied, 389 U.S. 996, 88 S.Ct. 500, 19 L.Ed.2d 494; Jones v. State, 171 Tex.Cr.R. 608, 352 S.W.2d 270.

We also conclude that the facts in this case are sufficient to differentiate it from Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306, cited by appellant, in which the arrest of the defendant depended entirely upon a police broadcast of information based upon a faulty warrant.

We further note that appellant took the stand and testified fully concerning the circumstances surrounding the homicide, his arrest and the finding of the pistol and the bullets, thereby foreclosing the question of the legality of his arrest and the seizure of the gun and bullets. Robbins v. State, Tex.Cr.App., 481 S.W.2d 419; Baity v. State, Tex.Cr. App., 455 S.W.2d 305; Cook v. State, Tex.Cr.App., 409 S.W.2d 857.

Appellant's first ground of error is

overruled.

Appellant's second ground of error is that the court erred in permitting the witness Isbell to make an in court identification of appellant's companion. Isbell arrived at the filling station while the robbery-murder was in progress and saw two black men coming from the station. Isbell stated that the larger of the two men had a pistol, but did not identify appellant as being that man. He did, however, identify appellant's companion, without objection, as being the smaller of the two men who had no visible weapon at the time he left the station. This Court has held in Lucas v. State, Tex.Cr.App., 444 S.W.2d 638, and Martinez v. State, Tex.Cr.App., 437 S.W.2d 842, that timely objection to identification must be made. Cf. McElwee v. State, Tex.Cr.App., 493 S.W.2d 876 (1973).

Appellant's second ground of error is overruled.

Appellant's third ground of error is that the court erred in submitting the issue of appellant's guilt of murder based upon the commission of a robbery. He contends that the evidence does not support the submission of such an issue.

Fortunately for this Court, we have the opinion by Judge Hawkins in Cook v. State, 152 Tex.Cr.R. 51, 211 S.W.2d 224, for guidance. We conclude, as did Judge Hawkins in Cook v. State, supra, that State's evidence as well as the appellant's testimony would support the conclusion that appellant and his companion intended to "high-jack" the filling station attendant.

Appellant's third ground of error is overruled.

His fourth ground of error relates to the State's evidence adduced at the punishment stage of the trial. Over objection, it was established that appellant while a resident of Florida had plead guilty to two offenses of carrying a concealed weapon and discharging a firearm for which he was sentenced to thirty (30) days in each case. It was also shown that appellant was not represented by counsel at the time of such pleas. Though appellant testified that he had never been represented by counsel prior to the instant trial he declined to testify that he was indigent at the time of the 1965 pleas of guilty in Florida.

We have concluded that in the absence of a showing of indigency the trial court was not in error in permitting the proof of the two prior misdemeanor convictions in Florida. Ochoa v. State, Tex.Cr.App., 481 S.W.2d 847. We also conclude that these two 1965 misdemeanor convictions were not of sufficient gravity to have influenced the jury who had heard the testimony as to this filling station robbery-murder. Cf. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284.

Appellant's fourth ground of error is overruled.

Appellant's fifth ground of error, if we properly understand it, is that he was prohibited from fully cross-examining certain witnesses because of a stipulation which he had entered into with the State. Appellant has failed to show by bill of

exception or by offer of proof that he was deprived of any testimony which would have been beneficial to him. Duncan v. State, Tex.Cr.App., 459 S.W.2d 822; Johnson v. State, Tex.Cr.App., 456 S.W.2d 396.

We find no merit in this ground.

Appellant's last ground of error is one the writer has difficulty in answering. Appellant contends that the verdict is cruel and unusual in a constitutional sense. This Court has long ago committed itself to the proposition that if the penalty is within the prescribed limits set by the Legislature, as this is, that we will not disturb the jury's verdict. We abide by such ruling. Yeager v. State, Tex.Cr.App., 472 S.W.2d 119.

Finding no reversible error, the judgment is affirmed.

CROSS-EXAMINATION OF DEFENDANT
BY THE STATE OUTSIDE THE PRESENCE
OF THE JURY DURING THE SENTENCING PHASE
OF THE TRIAL.

State v. Mabry,
No. 15,067-B (Tex.Dist.Ct., Sept. 29, 1971)

STATE: (By Mr. Curtis) You never have had a job or anything like that the whole time you have been there in Mt. Dora, have you?

DEFENDANT: Yes sir.

STATE: Doing what?

DEFENDANT: Construction work and plant work, factory work.

STATE: Well, you just drift from one to the other and lay off a long time in between, wouldn't you?

DEFENDANT: No sir.

STATE: You can tell this Judge that you worked steadily?

DEFENDANT: Yes.

STATE: That you have made good money?

DEFENDANT: Well, for a while I did, sir.

STATE: For how long a time?

DEFENDANT: Well, mostly season work, sir.

STATE: Than, you would just work during the season when you felt like it, right?

DEFENDANT: No sir, I didn't, sir.

STATE: When would you work; how many months out of the year would you work?

DEFENDANT: I worked the whole season.

STATE: How many months out of the year would that be?

DEFENDANT: Well, sometime -- it's according to how long the season lasts. No particular time, how long a season lasts.

STATE: You are not going to tell this Court that you have worked as much as all year any of those times in Florida?

DEFENDANT: Yes, sir, I have.

STATE: Have you?

DEFENDANT: Yes sir.

STATE: Every month out of the whole

year?

DEFENDANT: Yes sir, I have.

STATE: Doing construction work?

DEFENDANT: Yes sir, doing construction work.

STATE: How much would you make when you were doing that construction work?

DEFENDANT: Well, sometimes eighty some dollars a week; I wouldn't say exactly.

STATE: Eighty something dollars a week?

DEFENDANT: Yes sir.

STATE: And I guess you are going to tell the Court that you were doing that sort of -- working and making that sort of money back in 1965?

DEFENDANT: Back in 1965, sir, I think I was picking -- I was working in season work.

STATE: You weren't working steadily or making any money, were you?

DEFENDANT: I was working steady.

STATE: Were you making any money?

DEFENDANT: Well, to the family, the size of my family, I considered it was enough, sir.

STATE: 1966 and '67, how about that; are you going to tell the Judge you were working steadily all year then?

DEFENDANT: I was working steady.

DECISION TO ADMIT EVIDENCE OF PRIOR COUNSELLESS MISDEMEANOR CONVICTIONS AT THE SENTENCING PHASE OF THE TRIAL

Record at 510-511
State v. Mabry, supra.

THE COURT: May I see the rap sheet? Counsel, approach the bench.

(Conference at the bench.)

THE COURT: We will take a fifteen-minute recess.

THE COURT: Gentlemen, first off, let me say that this case was pre-tried on two occasions, and I would have thought that counsel for the State and the defense would have anticipated this problem.

Is the first sheet of this cumulative of all the other sheets?

THE STATE: Yes, Your Honor, just the portion on the right-hand side, if the Court please.

THE COURT: The Court will grant the motion of the defense as to the offense

dated 4-17-65, no drivers license, etcetera.

THE STATE: Agreeable with the State.

THE COURT: The Court will deny the motion as to the offense of December 11, 1965, concealed weapon and dishcarging firearms.

The Court will grant the motion concerning the offense on 10-22-66, D & E and petty larceny, except insofar as it might be admissible as impeachment. In other words, I will not permit you to introduce it as independent evidence of a prior criminal record.

THE STATE: All right, Your Honor.

THE COURT: The Court will grant the defense motion as to the violation of restrictive drivers license occurring on December 26th, 1967. The same goes for the reckless driving offense on

December 26, 1967, and for the speeding offense on April 12, 1970; the reckless driving on October 6th, 1970, and the fleeing of police officer on October 5, 1970.

His motion is granted on the ground that there has been no showing that the Municipal Court of Mt. Dora is a court of record or that these offenses which have been excluded are material to the present offense, and on that ground only.

DEFENSE COUNSEL: Note our exception.

THE COURT: Let me make it clear for you, Mr. Hale. In all other respects the defense motion to suppress will be denied.

DEFENSE COUNSEL: Note our exception, Your Honor,

RESPONDENT'S DIRECT TESTIMONY DURING THE EVIDENTIARY HEARING IN FEDERAL DISTRICT COURT.

Record at 9
Mabry v. Estelle
CA-2-74-86 (N.D. Tex., May 29, 1975)

RESPONDENT'S COUNSEL: What was your economic situation at that time? Were you employed?

RESPONDENT: No, sir. I wasn't employed during this time. I was --

RESPONDENT'S COUNSEL: Okay. Did you have any money or property?

RESPONDENT: No, sir, I didn't have any money. When they arrested me, I didn't have any and I wasn't working, you see.

RESPONDENT'S COUNSEL: Okay.

RESPONDENT: See, I was living with a young lady, you know, and she was paying the rent. The rent wasn't but six dollars a week and